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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

November 16, 1998

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VIA HAND DELIVERY

Magalie Roman Salas, Esq.  
Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, D.C. 20554

Re: In the Matter of 1998 Biennial Review --  
Streamlined Contributor Reporting Requirements  
CC Docket No. 98-171

Dear Ms. Salas:

Transmitted herewith, on behalf of RSL COM U.S.A., Inc. and Delta Three, Inc., is an original and four (4) copies of their Joint Reply Comments in the above-captioned proceeding.

An extra copy of the filing is enclosed. Please date-stamp the extra copy and return it to the courier for return to me.

If you have any questions please contact the undersigned.

Very truly yours,

HOLLAND & KNIGHT LLP



Eric Fishman  
Counsel for RSL COM U.S.A., Inc.  
and Delta Three, Inc.

ef;ewd

Enclosures

cc: Mr. Scott K. Bergmann, FCC (by Hand)

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BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
1998 Biennial Review -- )  
Streamlined Contributor Reporting )  
Requirements Associated with Administration )  
of Telecommunications Relay Services, North )  
American Numbering Plan, Local Number )  
Portability, and Universal Service Support )  
Mechanisms )

CC Docket No. 98-171

To: The Commission

**JOINT REPLY COMMENTS OF  
RSL COM U.S.A., INC. AND DELTA THREE, INC.**

RSL COM U.S.A., Inc. ("RSL USA") and Delta Three, Inc. ("Delta Three") (collectively, "RSL"), by their attorneys, hereby respectfully submit these reply comments to the comments filed in response to the *Notice of Proposed Rule Making* and *Notice of Inquiry* released by the Federal Communications Commission ("Commission" or "FCC") on September 25, 1998 in the above-referenced docket. *Notice of Proposed Rule Making* and *Notice of Inquiry*, CC Docket No. 98-171, FCC 98-233 (rel. Sept. 25, 1998) ("*NPRM*").

RSL commends the Commission and generally supports the Commission's proposal to consolidate the collection of contribution data for the universal service support mechanism ("Universal Service Fund"), the Telecommunications Relay Services Fund, and the cost recovery mechanisms for the North American Numbering Plan and Local Number Portability (collectively, the "Funds"). The streamlining of the different reporting worksheets into a unified

Telecommunications Reporting Worksheet ("Unified Worksheet") will result in administrative cost savings for reporting carriers which is in the public interest.

However, RSL agrees with IDT Corporation ("IDT") that the proposed instructions to the Unified Worksheet would substantively change the Commission's Universal Service rules by requiring, for the first time, Internet and Internet Protocol ("IP") telephony providers to file the Unified Worksheet. *See* IDT Comments (filed Oct. 30, 1998).

## **I. INTRODUCTION AND BACKGROUND.**

1. RSL USA is a domestic and international telecommunications company regulated under Title II of the Communications Act of 1934, as amended (the "Act"). Delta Three is a wholly-owned subsidiary of RSL USA and manages the world's largest Internet telephony network, with more than 30 international points of presence. Currently, Delta Three is not required to file the various reporting worksheets proposed for consolidation in this *NPRM* proceeding. Delta Three has an interest in this proceeding because the Unified Worksheet would impose a new cost on providers of Internet and IP telephony services by requiring such providers to file the Unified Worksheet and make contributions to the Universal Service Fund.

2. Currently, pursuant to Title II of the Act, all common carriers with interstate revenues are required to submit a variety of reporting worksheets detailing their revenues and other data for purposes of calculating contributions or cost recovery for the Funds. The Act defines "common carriers" as all persons "engaged as a common carrier for hire, in interstate and foreign communications." 47 U.S.C. § 153(10). At this time, RSL does not comment on whether Internet and IP telephony providers are "common carriers" regulated by Title II of the

Act. We note only that, at least for the past decade, the Commission has consistently determined that providers of Internet and IP telephony services are not subject to regulation under Title II.<sup>1</sup>

3. On September 25, 1998, the Commission released this *NPRM* which proposes to simplify the Commission's filing requirements so that a single worksheet, the Unified Worksheet, will replace several different forms currently filed. Line (211) and Line (226) require carriers to report revenue from ordinary long distance and other switched toll services for purposes of calculating contributions to the Universal Service Fund. The instructions for these line items provide, in part, "this category includes calls handled using internet technology as well as calls handled using more traditional switched circuit techniques." Thus, Line (211) and Line (226) would appear to require Internet and IP telephony providers to file the Unified Worksheet and to contribute to the Universal Service Fund.

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<sup>1</sup> In *Computer II*, the Commission classified all services offered over a telecommunications network as either basic or enhanced services. *Amendment of Section 64.702 of the Commission's Rules and Regulations, Final Decision*, 77 FCC 2d 384 (1980) (prior and subsequent history omitted). A basic service consists of the offering, on a common carrier basis, of pure "transmission capacity for the movement of information." *Id.* ¶ 93. An enhanced service, by contrast, is defined as "any offering over the telecommunications network which is more than a basic transmission service." *Id.* ¶ 94. Internet telephony is considered an enhanced service. *Id.* ¶¶ 93-97, 113-14. The Commission found that enhanced service providers were not common carriers within the meaning of the Act, and therefore were not subject to regulation under Title II. *Id.* ¶ 120.

Later, in the Telecommunications Act of 1996 (the "1996 Act"), Congress added new definitions to the Act, specifically "information service," "telecommunications carrier," and "telecommunications service". 47 U.S.C. § 153(20), (44), (46). The 1996 Act imposes a wide variety of obligations on telecommunications carriers that provide telecommunications services, including, among other things, obligations relating to the Universal Service Fund. The 1996 Act does not impose such obligations on telecommunications providers who do not provide telecommunications services (and therefore are not telecommunications carriers). The Commission has determined that Internet access providers offer "information services" and hence are not required to satisfy the obligations imposed by Title II. *Federal-State Joint Board on Universal Service, Report to Congress*, CC Docket No. 96-45, FCC 98-67 (1998), ¶ 46. With respect to phone-to-phone IP telephony services, the Commission has declined to categorize those services as telecommunications services without a more complete record. Thus, currently, phone-to-phone IP telephony providers also are not required to contribute to the Universal Service Fund. To date, the Commission has not squarely addressed the issue, nor even opened an inquiry to explore the issue.

Finally, just two weeks ago the Commission again stated that it has no desire to regulate or tax the Internet. See generally CC Docket No. 98-41 (Statement of Chairman Kennard dated November 6, 1998).

4. As mentioned above, IDT filed comments in response to the *NPRM*. With respect to the instructions for Line (211) and Line (226), IDT claims that the Commission's proposal to require Internet and IP telephony providers to contribute to the Universal Service Fund is a new substantive rule. IDT Comments at 9-10. As such, IDT asserts that the Commission's failure to provide adequate notice of and an opportunity to comment on the new rule violates the Administrative Procedures Act ("APA"). *Id.* Accordingly, IDT argues that the Commission should not adopt the proposed instructions, and should institute a rule making proceeding to specifically address the proposed new rule.

**II. THE COMMISSION MUST PROVIDE ADEQUATE NOTICE OF AND AN OPPORTUNITY TO COMMENT ON THE PROPOSAL TO REQUIRE INTERNET AND IP TELEPHONY PROVIDERS TO CONTRIBUTE TO THE UNIVERSAL SERVICE FUND.**

5. RSL agrees with IDT that the *NPRM* does not address the Commission's proposal to require Internet and IP telephony providers to contribute, for the first time, to the Universal Service Fund. In addition, RSL agrees with IDT that this requirement would be a new substantive rule and therefore, pursuant to the APA, the Commission is required to provide adequate notice of and an opportunity to comment on the new rule. Moreover, a separate rule making proceeding to discuss and analyze the relevant issues will provide the Commission with a more complete record.

6. As previously mentioned, Internet and IP telephony providers currently are not required to contribute to the Universal Service Fund. This is consistent with the Commission's interpretation of Title II, which gives the Commission authority to regulate common carriers. As discussed in Section I, the Commission has repeatedly concluded that Internet and IP telephony providers are not common carriers within the meaning of the Act and hence are not

regulated by Title II. The proposed instructions to the Unified Worksheet purport to require Internet and IP telephony providers to contribute to the Universal Service Fund. The instructions would substantively change the Commission's Universal Service rules and policies. Therefore, under the APA the Commission must institute a separate rule making proceeding to address the proposed new substantive rule.

7. Section 553 of the APA requires a federal agency to institute a rule making proceeding each time it proposes to adopt a new rule. 5 U.S.C. § 553. A rule making proceeding is intended to provide the public with notice of a proposed rule and an opportunity for parties, especially those who may be adversely affected, to comment on the rule. Here, in the course of consolidating various reporting worksheets, the Commission proposed to redefine the class of contributing carriers to include Internet and IP telephony providers without first giving the public notice of the proposed change or an opportunity to comment on the change.

8. Instead, the Commission has proposed to impose this new, binding obligation on Internet and IP telephony providers by simply amending the instructions to Line (211) and Line (226) of the Unified Worksheet. Redefining the class of contributing carriers is a substantive change for which an opportunity for notice and comment is not optional. Therefore, pursuant to the APA, the Commission must institute a separate rule making proceeding to specifically address the proposal to require Internet and IP telephony providers to contribute to the Universal Service Fund.

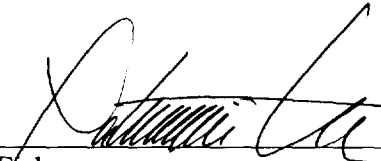
### **III. CONCLUSION.**

For all these reasons, the Commission should not adopt the proposed instructions for Line (211) and Line (226). Instead, as required by the APA, the Commission should institute a

separate rule making proceeding to discuss and analyze the issues relevant to requiring Internet and IP telephony providers to contribute to the Universal Service Fund.

Respectfully submitted,

RSL COM U.S.A., Inc. and  
Delta Three, Inc.

A handwritten signature in black ink, appearing to read 'Eric Fishman', is written over a horizontal line.

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November 16, 1998

WAS1-395152

## CERTIFICATE OF SERVICE

I, Ellen Dorsey, an employee at the firm of Holland & Knight LLP, do hereby certify that on November 16, 1998, a copy of the foregoing Joint Reply Comments of RSL COM U.S.A., Inc. and Delta Three, Inc. was served by first class U.S. mail, postage prepaid, to the following:

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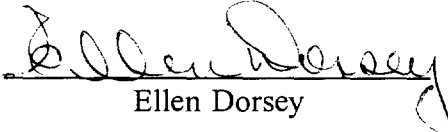
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